

Faces 2009 Epilepsy Conference
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*Educational Entitlements and Accommodations –
What Are My Rights?*

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A. The Starting Point— Quality and Comprehensive *Assessments* Demonstrating The *Need* for Special Services And/Or “Accommodations”

1. Referring a child to the local educational agency or early intervention provider
 - Bring *attention* to seizure activity.
2. Sharing private assessments and evaluations;
 - Good faith cooperation and disclosure are very important.
 - It is important to consent to reasonable requests by the school district for evaluations.
3. Following the Assessment Timeline
 - 20 U.S.C. § 1414 sets forth the timeline.
 - The timeline is normally 60 days.
4. Understanding your right to request an “independent” evaluation
 - Evaluations are at the district expense if you are dissatisfied with the school district’s evaluation.
 - There is a corresponding obligation of *school district* to bring parent to due process if it disagrees with that request.
5. Understanding the importance of teasing out the particular conditions and impact of epilepsy or seizure disorder on the individual child’s functioning and capacity to learn
 - Stay away from the generic.
 - Getting specific is key.
6. Collecting reports from neurologists, educational consultants and behaviorists
 - Show how seizure activity affects the student.
7. Anticipating the needed “plan”

- How will seizures be handled?
- How are routine or emergency medications to be administered?
- Are special education services indicated?
- What kinds of accommodations will the child receive?

8. Possible statutory protections:

(a) **IDEIA** – Individuals with Disabilities Education Improvement Act

- i. Guarantees a “free appropriate public education” for children with eligible disabilities
- ii. Eligibility results in development of an Individualized Education Plan, or “IEP”

(b) **Section 504** of the Rehabilitation Act

- i. Prohibits discrimination on basis of disability in schools and other federally funded program
- ii. Eligibility results in development of a “Section 504 Plan”
- iii. Eligibility for protection will turn on whether seizure activity is such that it “substantially limits” a major life activity such as learning, walking, seeing, hearing, speaking, or “self care” functions.
34 C.F.R. 104.3(j)(2)(ii).

(c) **ADA** – Americans with Disabilities Act

- i. Prohibits discrimination on basis of disability in schools, recreation programs and other state and local government activities

B. “Classification” of Epilepsy/Seizures

1. **Eligibility**

- a. Special education services and accommodations may be provided under IDEIA or Section 504.
- b. Although millions in the U.S. have epilepsy, there is no specific administrative “epilepsy” classification for IEP purposes.
- c. Epilepsy, however, can come under the umbrella classification of “other health impaired” or “OHI,” provided that the child’s disability adversely affects his or her educational performance and that there is a resulting need for special education services. 34 C.F.R. § 300.8.
- d. Eligibility turns on the issue of whether the student’s seizure activity is such that it *adversely affects educational performance*. 34 C.F.R. § 300.8(b)(9).
- e. Accordingly, this is an issue that needs to be brought out via evaluations and assessments.

2. Evaluations

- a. Upon request and consent of parent, school district must evaluate your child within 60 days to ascertain if there is a disability condition that adversely impacts on educational performance.
- b. If there is a disability condition that adversely impacts education performance, an IEP or a Sec. 504 plan is required to be developed with your participation.

3. Parents’ rights

- a. Parents are entitled to:
 - i. see all educational records
 - ii. be notified of meetings
 - iii. participate in all meetings
 - iv. request independent evaluations
 - v. seek mediation or due process (an impartial hearing) if there is disagreement with the school district’s determination

- This may happen if the district does not classify your child as eligible, or if you disagree with the district’s recommended plan – even if it finds your child eligible.
- vi. Note: A neurologist *may* attend the IEP meeting, but most often, quality and comprehensive reports from the neurologist and/or other professionals are most persuasive and also avoid “lost in translation” issues.

4. **Establishing epilepsy**

- a. It is important to provide recent reports and evaluations from your child’s neurologist, information regarding use of anti-epileptic drugs and targeted recommendations concerning the need(s) for services and accommodations.

C. After eligibility is established – The Contents of the IEP

1. Accommodations (e.g. extra time for tests, proximate seating, etc.)
2. The student’s present levels of functioning
3. Annual goals
4. Description of special education services, related services (e.g. speech, occupational therapy, etc.) including frequency, etc.
5. Program modifications and supports
6. Accommodations for testing

D. Consideration of “Least Restrictive Environment”

1. The “Least Restrictive Environment” is a Congressional mandate requiring that students with eligible disabilities must be educated with their non-disabled peers to the “maximum extent appropriate.”

E. Disciplinary suspensions

1. Disciplinary suspensions are subject to a 10 day threshold.
2. Going forward, there is a need for a “functional behavioral assessment” and a behavior intervention plan to address behavior.
3. There is a need for ”manifestation determination.”

F. Public School vs. Parochial

1. The statutory protections apply to all *public* schools, since they receive federal and/or state funding.
2. Parochial schools, on the other hand, are not subject to IDEA or Sec. 504 protections *unless* they are receiving funding, directly or indirectly, from a federal agency source.

G. “Routine” delivery of AEDs:

1. No school must *fund* antiepileptic drugs; however, most schools and child care providers are obligated to provide routine administration of AEDs and may not rotely follow “no medication” policy.
2. Note the “undue burden” exception or any situation where administration of the AEDs would cause a fundamental alteration of the program.
3. Today, AEDs are routinely administered and it is less of an issue than it used to be.

H. Individualized Special Education Services

1. The IEP team must consider the full impact of the student’s condition to see how, and to what extent the epilepsy is adversely affecting the student’s educational program. Questions can include:

- (a) Is there any issue with memory?
- (b) Is there any history of regression?
- (c) Does the student have special dietary needs?
- (d) What are the side effects of medications?
- (e) What is the average frequency and duration of seizures?
- (f) What subject areas are most affected?
- (g) What is the impact on social relationships at school?
- (h) Are there any physical restrictions or limitations?
- (i) What accommodations are needed for classroom instruction and homework assignments?
- (j) Is there a need for a “health paraprofessional” or, in certain circumstances, a specially trained nurse? (Test: Does the student *need* a health para or nurse in order to access right to a FAPE?)
- (k) Is there a need for counseling as a related service?
- (l) Is there a need for parent counseling?
- (m) Is there a need for speech or occupational therapy?
- (n) Is there a need for behavioral support?
- (o) Is there a need for dietary management?
- (p) Should any allergy accommodations be made?
- (q) Is there a need for “ESY” (Summer) services to forestall anticipated regression?

2. How will a health para or nurse be trained?

- (a) The IEP should provide for and describe the needed training.
- (b) The IEP should specify the identity of the training source.

I. Disagreement with school district

- A. The district must be *put on notice* of the parents’ challenge, any intention to secure private services and any intention to look to the district for reimbursement or other funding.

- B. Some common challenges include:
- i. Challenge to ineligibility determination
 - ii. Challenge to an inadequate IEP
 - iii. Challenge to an inadequate Section 504 plan
 - iv. Challenge to IEP *fulfillment*
 - v. Challenge to an inappropriate program or placement
 - vi. Challenge to inadequate accommodations
 - vii. Challenge to inadequate AED administration
 - viii. Challenge to diet administration
 - ix. Challenge to secure private school tuition or the cost of special education supports and services that district is not providing
 - x. Challenge to unduly restrictive seating or “helmet” requirements
- C. The usual mechanism for addressing these challenges is an impartial hearing after a “resolution meeting.”

J. Some Important Court Decisions

- A. *Cedar Rapids v. Garret F.*, 526 U.S. 66 (1999)
- Stands for proposition that nursing services are considered “related” services under the IDEIA statute and that school districts do not enjoy an “undue financial hardship” defense to the cost of services that are needed for the student to gain access to a free and appropriate public education.
- B. *Hood v. Encinitas Union Sch. District*, 486 F.3d 1099 (9th Cir. 2007)
- Since a student was not “adversely affected” in her educational performance, seizure disorder did not qualify student for special education services under “other health impaired.”

- C. *P.S. v. Brookfield Bd. of Educ.*, 186 Fed. Appx. 79 (2d Cir. 2006)
- Parents' claim for tuition reimbursement was denied for student with epilepsy where parents refused school district's request to have its psychologist evaluate the student. This highlights the importance of cooperation and "equitable" and fair dealing.
- D. *Heather S. v. Wisconsin*, 125 F.3d 1045 (7th Cir. 1997)
- This is an eligibility classification case where it was questioned whether the student should be classified as OHI or learning disabled. The IEP team looked at the "primary" condition. This case also reiterates the principle that the school district is required to provide an "adequate" education, but not an optimal educational experience.
- E. *Zayas v. Puerto Rico*, 378 F. Supp.2d 13 (D.P.R. 2005)
- The school district was ordered to pay transitional tuition for a year for the student's private school where the student had epilepsy and was emotionally fragile, and psychological needs could be addressed at the private school, and yet could not be adequately addressed at the public school.
- F. *Marple-Newtown Sch. Dist. v. Rafael*, 2007 LEXIS 62494 (E.D. Pa. 2007)
- Where a student exhibited severe seizures, the court held that the student's IEPs needed to specify the means of communication between the

student's educational and medical teams as well as compensating the student for those portions of the school day where he was asleep or unresponsive due to his seizures or the effects of his medication. Previously, the school district had ignored testimony that the student's neurologist should be involved as a member of the IEP team.

- G. *Sandlin v. Switz. County Sch. Corp.*, 2009
U.S. Dist. LEXIS 72689 (S.D. Indiana 2009)
 - A student experienced epileptic seizures followed by restraint procedures and removal of student for disciplinary issues. Numerous claims were dismissed.

- H. *D.K. v. Solano County Office of Educ.*,
2008 U.S. Dist. LEXIS 101169 (E.D. Cal. 2008)
 - This case presented claims of a teacher and aides physically abusing, ridiculing and taunting a student as alleged punishment for disability related behavior. It suggests the need for periodic observation by educational consultant.